

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
PETITION FOR
REHEARING
EN BANC**

ORIGINAL

77-2059

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

-----X
SAMUEL ALLEN, RAYMOND HARDRICK and
MELVIN LEMMONS,

Petitioners,

- against -

COUNTY COURT, ULSTER COUNTY, NEW YORK
WOODBOURNE CORRECTIONAL FACILITY,
Woodburne, New York,

Respondents.
-----X

PETITION FOR REHEARING OR
REHEARING EN BANC

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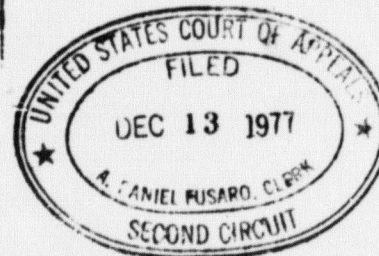


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Woodburne, New York, :

Respondents. :

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PETITION FOR REHEARING OR
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Preliminary Statement

This is a memorandum of law in support of respondents-appellants' petition for rehearing with suggestion for rehearing en banc. On November 29, 1977, a panel of this court affirmed a decision of the District Court (Owens, J.) granting petitioners habeas corpus relief. This Court affirmed the judgment below on the grounds that New York Penal Law § 265.15, which permitted the jury to rely upon a presumption to find possession of a loaded firearm, was unconstitutional on its face. Respondents petition this Court for reconsideration because of the far reaching impact of this decision on the administration of criminal justice in the

the State of New York. The facts are as stated in the majority opinion.

POINT I

THE MAJORITY OF THE PANEL
IMPROPERLY REACHED THE ISSUE
OF THE FACIAL CONSTITUTIONALITY
OF PENAL LAW § 265.15.

The majority of the panel, in affirming the decision below, held that Penal Law § 265.15 is facially unconstitutional. In order to reach this sweeping conclusion the majority disregarded two related procedural doctrines which this Court has historically held to be critical to the availability of habeas corpus relief, the exhaustion requirement and the by-pass rule. In addition, by refusing to limit itself to the facts of this case, the majority radically departed from the traditional mode of adjudicating constitutional questions.

A.

Although the majority opinion concedes that the petitioners failed to brief or argue the question of the facial unconstitutionality of the statute before the Appellate Division or the Court of Appeals (Slip. op., p. 545 f n. 9), it found that the petitioners nevertheless satisfied the exhaustion requirement and gave the state courts the initial opportunity of reviewing the statute by claiming that the statute was unconstitutional as

as applied to the facts of their case.* It is respectfully submitted that the majority's analysis of which issues were before the New York Court of Appeals, and what that Court decided is incorrect. In its opinion, the New York Court of Appeals expressly refrained from considering the question of whether the statute was properly applied because of petitioners' failure to object to the jury charge.* How then may it be assumed that the Court nevertheless considered the broader question of whether the statute was constitutional on its face?

The New York Court clearly stated the basis for its affirmance as follows:

"[T]he trial court never charged the jury with respect to the 'as the person exception.' Nevertheless the defense did not except to the absence of this language in the court's charge.** As a result, what we view as a jury question was never presented to the jury and for the reasons

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* Later in its opinion (slip op.562) the majority inconsistently describes the "as applied" approach as resembling "more a holding as to the sufficiency of the evidence than the 'more likely than not' determination required by Leary." The majority complains that "such a particularized analysis of the applicability of a presumption would involve us in the nature and quality of the evidence required to uphold a conviction under state law."

** The trial judge invited exceptions to the charge on three separate times. (A56,A61). There was also a lengthy colloquy covering other aspects of the charge. Nevertheless, the petitioners, individually represented by counsel, did not even hint that the Court was in error in failing to charge the "on the person" exception.

stated we cannot conclude in this case that as a matter of law the presumption was inapplicable." (A28) (emphasis supplied)

In a separate opinion, Judge Jones explicitly restated the narrow basis for the Court's affirmance as follows:

"But no reference was made in the charge to the statutory provision that the presumption would not apply 'if such weapon . . . is found upon the person of one of the occupants.' No exception was taken to this charge and no request was made that the charge be accurately completed. Thus, the jury was never advised of the exception and the case was submitted to and resolved by it on the basis of a blanket presumption which had become the law of the case. Accordingly, in the procedural posture in which these verdicts were returned there can only be an affirmance (A.33)."

On this record the majority's determination that petitioners satisfied the exhaustion requirement is unsupportable and represents a retreat from the consistently strict interpretation heretofore given that requirement by this court.* Cameron v. Fastoff, 543 F. 2d 97, 976-978 (1976).

Moreover, notwithstanding this Court's earlier language in Stubbs v. Smith, 533 F. 2d 64 (2nd Cir. 1976), this is not a case in which the Court is entitled to assume, for exhaustion purposes that the New York Court of Appeals has previously ruled on the constitutionality of this statute. Although the majority cited People v. Russo, 303 N.Y. 673 (1951) and People v. Leyva, 38 N.Y. 2d 160 (1975) as examples of the New York court's rejection of "the substance of petitioners claim", neither of

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*Assuming the majority was correct in their conclusion that the issue of the constitutionality of section 265.15 was raised and decided in the New York Court of Appeals, petitioners nevertheless failed to exhaust their remedies by foregoing their right to an automatic appeal to the Supreme Court of the United States pursuant to 28 USC §1257(2). This failure also bars consideration of this claim in this court.

those cases provide support for this position. Russo was decided eighteen years before the Supreme Court articulated its standard of review in Leary v. United States, 395 U.S. 6 (1969). Leyva, a case which involves a dealership quantity of narcotics, not a loaded firearm, is carefully distinguished from the instant case by the majority later in its opinion. Therefore, the majority's conclusion that the New York Court of Appeals would have rejected petitioners' constitutional claim had it been properly raised, is mere speculation and constitutes another step backward from this Court's interpretation of the exhaustion requirement. Cameron v. Fastoff, supra.

B.

The majority opinion also undercuts the by-pass doctrine recently clarified in Wainwright v. Sykes, ____ U.S. ____ USLW 4807 (1977). While the majority points approvingly to "the advantages that flow from informing a trial judge of the possibility of unconstitutional error at a time when action can be taken to correct it" (slip. op. p. 550), it attempts to distinguish the instant case from Wainwright by concluding that unlike Wainwright's failure to make a timely objection under Florida's contemporaneous objection rule the failure of petitioners herein to make a timely objection to the incomplete charge, did not prevent their claims from being fully considered by the New York Court of Appeals. This "bootstrap" argument must be rejected for two reasons. First, as previously pointed out herein, five judges of the New York Court of Appeals clearly stated that they

were unable to reach the merits of the petitioners' "as applied" claim because of the incomplete charge.* Thus the "federalism interest" was never vindicated. Even more importantly, the Supreme Court clearly intended Wainwright to apply to the precise situation presented by this case. It is possible that if the jury had been charged with the "on the person" exception, coupled with the presence of the guns in Jane Doe's purse, it would have acquitted petitioners of the firearms possession charge, just as it acquitted them of the possession charges relating to the machine gun and heroin solely on the evidence that the trunk was locked and no key was ever recovered from any of the petitioners. Justice Renquist, who wrote for the majority in Wainwright, recognized this precise point in his footnote in Mullany v. Wilbur, 421 U.S. 684, 704 (1975), in which he stated:

"While Fay v. Noia, 372 U.S. 391 9 L Ed. 2d 837, 835 at 822 (1963), holds that a failure to appeal through the state-court system from a constitutionally infirm judgment of conviction does not bar subsequent relief in federal habeas corpus, failure to object to a proposed instruction should stand on a different footing. It is one thing to fail to utilize the appeal process to cure a defect which already infers on a judgment of conviction, but it is quite another

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*Unable to reach the "as applied" claim because the presumption was not fully charged, the court most certainly could not have reached the facial unconstitutionality claim as this claim was never raised below, nor was it ever argued or briefed in any state court. I McKinney's Statutes § 150.

to forego making an objection or exception which might prevent the error from ever occurring. Cf. Davis v. United States, 411 MS 233, 36 L. Ed. 2d 216, 93 SA 1577 (1973)." (emphasis supplied).

C.

The respondents are in full agreement with Judge Timbers' cogent analysis of the restraints which preclude a court from "formulating a rule of constitutional law broader than is required by the precise facts to which it is to be applied." United States v. Raines, 362 U.S. 17 (1959) citing Liverpool, N.Y. & P.S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39; 28 L. Ed. 899, 901 5 S. Ct. 352 (1885). Judge Timbers also correctly points out that only in extraordinary circumstances, such as when First Amendment interests are implicated, may a court depart from the normal conditions of constraint. Such extraordinary circumstances are seldom encountered in cases involving the criminal process. See Note, -The First Amendment Overbreath Doctrine, 83 Harv. L. Rev. 844, 852, f.n. 33. In fact, in the area of criminal justice, the federal courts are particularly constrained from precipitously declaring a state statute unconstitutional.

Only recently, in Patterson v. New York, _____ U.S. _____, 45 U.S.L.W. 4706 (U.S. June 17, 1977) the Supreme Court stressed the primacy of the states in the administration of criminal justice, and the respect to be accorded:

"It goes without saying that preventing and dealing with crime is much more the business of the states than it is of the Federal Government, [citation omitted], and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is 'normally within the power of the state to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion.'" Ibid, 45 U.S.L.W. at 4709 (citations omitted).

For this reason this Court should be most reluctant to reach out to strike down a state evidentiary presumption relating to the "burden of producing evidence." It should not strain to apply a strict test of constitutionality which would unduly impair the State's freedom to structure its criminal justice system to meet the demands upon it.

POINT II

ASSUMING THE QUESTION IS PROPERLY
BEFORE THIS COURT, PENAL LAW § 265.15
IS CONSTITUTIONAL IN ITS FACE.

The majority places great, and in fact, overwhelming reliance upon a series of Supreme Court decisions, beginning with Tot v. United States, 319 U.S. 463 (1943), in which the Court decided, on direct review from the lower courts, the constitutionality of various federal law presumptions. However, as the Supreme Court recently indicated in Patterson v. New York, supra, state law presumptions are entitled to a more lenient standard of review than federal law presumptions. In accord with the principle enunciated in Patterson, the Supreme Court recently refused to declare another of New York's penal law presumptions unconstitutional. In People v. Kirkpatrick, 32 N Y 2 17 (1973) appeal dismissed for want of a substantial federal question* 414 U.S. 938 (1973), a case not heretofore brought to the attention of this Court, the Court was asked to consider the constitutionality of Penal Law § 235.10 subd. 1, which provides that a person who sells obscene material in the course of his business is presumed to do so with knowledge of its contents and character. The Court's dismissal of this appeal is

* This of course represents a statement on the merits by the Supreme Court of presidential value. Ahern v. Murphy, 457 F. 2 363 (7th Cir. 1972); Connor v. Hutto, 516 F. 2d 853, cert. den, 423 U.S. 929.

particularly significant*, as the defendants were convicted of the crime of selling obscene material knowing its contents and character. Uncontroverted evidence offered to rebut the presumption included: (a) the stock of one defendant's bookstore exceeded 25,000 volumes, (b) the stock of the other defendant's store exceeded 50,000 volumes, (c) the covers of the obscene publications were not obscene, (d) both defendants denied having read or examined the publication.

On the basis of these facts, and presented with a statute which permitted a double presumption -- knowledge both of the contents and the character -- to flow from the act of selling, the Supreme Court refused to find the statute unconstitutional either on its face, or as applied. A fortiori, the presumption in the instant case, which is far more easily rebuttable, and which is founded up on a far more rational connection between the proved fact and the presumed fact, must meet with the Supreme Court's approval.

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* The conviction was affirmed 4-3. Judge Field's vigorous dissenting opinion, in which Judges Jones (who concurred in the instant case) and Wachtler joined, not only found that the presumption failed to meet the Leary test, but was blatantly violative of the defendants' First Amendment rights. Thus the Supreme Court's decision dismissing the appeal is especially persuasive, in view of the favored status usually accorded First Amendment interests. See Note, The First Amendment Overbreath Doctrine, *supra*.

However, assuming that this Court may subject state law presumptions to the same degree of scrutiny it accords federal law presumptions, the presumption in the instant case is no less rational than the presumptions upheld in Barnes v. United States, 412 U.S. 837 (1973) (presumption of knowledge that property had recently been stolen flowing from unexplained possession of recently stolen property), and United States v. Gainey, 380 U.S. 63 (1964) (presumption that one is carrying on the business of a distiller flowing from unexplained presence at an illegal still).

While the type of documentary evidence relied upon by the Supreme Court in United States v. Leary, supra and Turner v. United States, 396 U.S. 398 (1970), which reduced the "rational basis" test to a mathematical certainty, would be a desirable analytic tool, the instant case is not amenable to such an analysis. However, neither the petitioners nor the majority are able to point to one reported case in which the State of New York convicted an innocent hitchhiker or other casual passenger of possession of a loaded firearm through the use of this presumption. Respondents' research has also failed to unearth even one such case.* In the absence of any empirical

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*The majority poses a hypothetical situation in which a hitchhiker or other casual passenger may be convicted of possession of a small gun, such as a derringer, concealed under a seat or in a glove compartment (slip. op. 557) solely on the base of this presumption. While it is always possible to conjure up remote hypothetical applications, the fact remains that this case involved two loaded large caliber handguns, one of which was in plain view of the passengers in the car.

evidence to the contrary, and bearing in mind that the judgment of the Legislature is entitled to great weight, Leary v. United States, supra at 39; United States v. Gainey, supra at 67, this Court should find Penal Law § 265.15 facially constitutional.

POINT III

PENAL LAW § 265.15 IS CONSTITUTIONAL AS APPLIED TO THE FACTS OF THIS CASE.

Assuming petitioners failure to object to the incomplete jury charge does not preclude this Court from considering their "as applied" claim, it is clear that the presumption was constitutionally applied to the facts of this case.

New York Penal Law § 10.00(8) defines the term "possess" as having "physical possession or otherwise to exercise dominion or control over tangible property". As the majority points out, this definition has been restated in cases involving firearms as requiring that the gun be "within the immediate control and reach of the accused." (slip. op. 556). It is uncontroverted that the guns were within easy reach of the three male passengers. Considering the intimacy of the interior of the automobile, the fact that Jane Doe made no attempt

to conceal the weapons from her fellow passengers, and the superior strength of Doe's male companions, it is readily apparent that there guns were within their control as well. These are "clearly identifiable factors" (slip. op. 562) from which an empirical relationship between the fact proved and the fact presumed can be drawn.

CONCLUSION

THE PETITION FOR REHEARING OR
REHEARING EN BANC SHOULD BE
GRANTED.

Dated: New York, New York
December 12 , 1977

Respectfully submitted,

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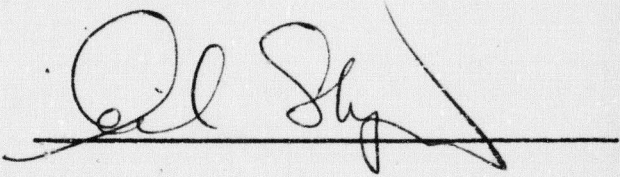
STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

Eileen Shapiro , being duly sworn, deposes and
says that she is an Assistant in the office of the Attorney
General of the State of New York, attorney for respondents
herein. On the 13th day of December , 1977, she served
the annexed upon the following named persons:

Goldberger, Feldman and Breitbart
401 Broadway
New York, N.Y. 10013

Attorney in the within entitled proceeding by depositing
a true and correct copy thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by the
Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorney at the
address within the State designated by him for that
purpose.

Sworn to before me this
13 day of December , 1977



Patricia C. Armstrong
Assistant Attorney General
of the State of New York